IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1294 of 2004

with

CRIMINAL MISC.APPLICATION No 7459 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NISHARBHAI BHIKHUBHAI MIR

Versus

STATE OF GUAJRAT

Appearance:

1. Criminal Appeal No. 1294 of 2004
   MR YOGESH S LAKHANI for Appellant No.
   MR KC SHAH, APP for Respondent No. 1
2. Criminal Misc.Application No. 7459 of 2004
   MR YOGESH S LAKHANI for Appellant No.
   MR KC SHAH, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 29/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant in this appeal has challenged judgment and order dated 30th June, 2004 passed in Sessions Case No, 160 of 2002 by the learned Addl. Sessions Judge, Vadodara wherein the appellant has been convicted for the offence punishable under section 363 of the Indian Penal Code [for short 'IPC'] and sentenced to suffer rigorous imprisonment [RI] for two years and to pay fine of Rs.3,000/=, in default to suffer further RI for three months. The appellant has been convicted for the offence punishable under section 366 of the IPC and sentenced to suffer RI for two years and to pay fine of Rs.3,000/=, in default to suffer further RI for three months. The appellant has also been convicted for the offence punishable under section 376 of the IPC and sentenced to suffer RI for life and to pay fine of Rs.5,000/=, in default to suffer further RI for three months. All the substantive sentences were directed to run concurrently.

2. It is the prosecution case that the prosecutrix Nasim, the daughter of complainant Kalubhai Kasambhai Qureshi had gone to school on 4/2/2002 at about 12.00 noon and had not returned back till evening. Kalubhai thereafter made hectic search for tracing out his daughter Nasim. Missing report was filed on 8/2/2002. Even thereafter also attempts to trace out the missing girl was continued. Complainant thereafter came to know that the present appellant, who was staying near the house of the complainant was also missing since the day on which his daughter was missing. According to the complainant, Nishar, the appellant herein, being a married person having two children might have kidnapped his daughter and, therefore, the complaint was filed against the appellant on 12/2/2002.

2.1. The police, after registering the offence, started investigation and necessary statements were recorded. In the meantime, the accused as well as the victims were apprehended, after making necessary panchnamas of the person of the accused as well as victim. Thereafter, the accused was arrested. After

completion of the investigation, police filed charge-sheet against the accused before the learned Magistrate, who in turn committed the case to the Court of Sessions as the offence under section 376 of the IPC is exclusively triable by the Court of Sessions.

2.2. The charge Exh. 3 was framed against the appellant, to which appellant pleaded not guilty and claimed to be tried. In his further statement recorded under section 313 of the Code of Criminal Procedure appellant has come out with a case that he was falsely involved in the offence. According to him, he was in love with prosecutrix and that he had neither kidnapped nor committed forcible intercourse with her and thereby committed rape on her.

2.3. At the end of the trial, the learned trial Judge, after appreciating the evidence on record, recorded the finding that the prosecutrix was minor on the day on which she was kidnapped from the lawful custody of her guardian. The learned trial Judge also recorded the finding that the prosecution has established that the accused has taken away prosecutrix from the lawful custody of her guardian with a view to have illicit intercourse with her and thereby to marry her. In view of the aforesaid findings, the learned trial Judge, as stated above, convicted the appellant for the offences for which he was charged and sentenced him to undergo the imprisonment for the terms as aforesaid.

3. We have admitted the appeal on 31/8/2004 and on the same day we have issued the notice as to bail. We have directed the appellant to supply the copies of the relevant evidence to the Court as well as to the otherside. Accordingly, the learned advocate has supplied the relevant evidence. Not only that but the record and proceedings are also kept present.

4. On going through the evidence, we find that the prosecution has in fact proved the charge of kidnapping as well as rape. Having faced with the situation, learned advocate for the appellant Mr. Lakhani has frankly conceded before us that as far as involvement of the accused in the said offence is concerned, he may not carry the matter further. He, however, has submitted that even while accepting the order of conviction, the sentence imposed upon by the learned trial Judge appears to be too harsh and has insisted for the interference of this Court in the matter. Looking to the facts and circumstances of the case, we also do find that the sentence imposed upon the appellant prima-facie appears

to be harsh and quite disproportionate and, therefore, with the consent of the learned advocates, we have decided to take up the appeal for final hearing today itself.

5. For the purpose of establishing the offence of kidnapping, the prosecution has mainly placed reliance on the circumstance that at the time of the offence the victim was minor. From the evidence of Kalubhai Qureshi, the father of the victim and Mumtazben Kalubhai, the mother of the victim, the prosecution has tried to establish that when the victim was kidnapped on 4/2/2002, she was 15 years, 6 months and 2 days' old; in other words she did not complete 16 years of age. P.W. Bhagvatibhai Tribuvandas Patel, Talati-cum-Mantri of village Undera has produced birth and death register for the period from 1986 to 1988. The birth entry in the said register of Nasim is made at entry no. 25. Exh. 160 is the birth certificate produced by this witness. Thus, from the documentary evidence on record, it is clear that the victim on 4/2/2002, when she was kidnapped, was below 16 years of age. It is true that Dr. Girishbhai Patel, who had radiologically examined the victim and has found that victim was between 17 and 19 years of age when she was examined by him. The learned trial Judge has not accepted the evidence of Dr. Patel on the ground that the evidence of the parents supported with the documentary evidence is more reliable. Since nothing has been pointed out to take a contrary view than the view expressed by the learned trial Judge, we accept the finding recorded by the learned trial Judge, namely that the victim was minor at the time of commission of the offence of kidnapping.

5.1. The prosecution from the evidence of the parents of the victim has also established beyond any manner of doubt that at the time of incident the victim was staying with them and was taken away by the appellant without their consent.

5.2. Victim - Nasim was examined at Exh. 23. Before examining her on oath the trial Court fully satisfied that she was capable of giving deposition and understand the importance of giving evidence on oath and, therefore, she was examined on oath. According to her, on 4/2/2002 she had gone to attend the school as usual from her house. Appellant met her on the way and offered her to sit on the scooter. When the witness declined, the appellant enticed her and made her to sit on the scooter. After covering some distance, the appellant halted the scooter and forcibly took victim in the Maruti Van. He

also gave threat not to shout for help. There was nobody on the road. As she was frightened, she did not shout for help. The appellant thereafter took her to Vadodara Railway Station. Both of them thereafter boarded the train. On 5/2/2002 they got down at Ludhiana. The appellant took her to hotel where he disclosed his name as Kalpesh B. Patel and gave name of victim as Sapna Patel. When the appellant wanted to have sexual intercourse at night, the victim told him that as he brought her against her will, she was not keen to maintain any relations and she was also not keen to be his wife. According to the victim, the appellant thereafter lost control and told her that as per Muslim law he has married her and she has to act as per his wish. Thereafter, the appellant had committed rape upon her against her will. Even thereafter also he did the same thing again at the same night. According to the witness, between 5/2/202 and 8/2/2002 every day he used to enjoy intercourse with her. On 9/2/2002 appellant took her to the market and her photographs were taken. The appellant thereafter took her to railway station on 10/2/2002 for going to Lucknow and again she was taken in a hotel at Lucknow. There also both of them were identified as Kalpesh B. Patel and Sapna Patel. The appellant also committed rape on her in the hotel at Lucknow. On 13/2/2002 she was taken to Gorakhpur where they stayed in a hotel. On 15/2/2002 both of them had gone to Khatmandu where they stayed at Ocen Blue Hotel. At Khatmandu also the same names were disclosed. They stayed there from 15/2/2002 to 19/2/2002. There also the appellant committed rape on her. On 23/2/2002 she was taken to Agra and at Taj Mahel also her photographs were taken against her wish. On 27/2/2002 she was taken to Vadodara where they stayed at Skylab Hotel by giving the same names as Kalpesh Patel and Sapna Patel. There also she was raped by the appellant.

5.3. When the appellant as well as victim were apprehended by the police, she was examined by Dr. Girishbhai Patel of S.S.G. Hospital. From the medical certificate produced at Exh. 26, it is clear that hymen of the victim was ruptured and speculum instrument was easily inserted in the vagina. From the evidence of Dr. Girish Patel and from the history given to the doctor by the victim, it is clear that accused had sexual intercourse with her.

6. The trial Court accepted the evidence of victim Nasim supported with medical evidence and recorded the finding that the victim was raped by the appellant on many occasions at different places and, therefore,

convicted the appellant for the offences of kidnapping as well as rape. Suffice it to say that we are in agreement with the finding recorded by the learned trial Judge, namely that the appellant committed the offence of kidnapping as well as rape on the victim. The only point to be decided in the present appeal is about the adequacy of the sentence.

7. Mr. Lakhani, learned advocate for the appellant has submitted that even if the entire finding of the trial Court is accepted against the appellant, the sentence awarded by the trial Court is very harsh and quite disproportionate in the facts and circumstances of the case. According to learned advocate, the victim, though minor, she was a willing partner and has moved with the appellant for about 23 days at different places. Even though she had many opportunities to come out from the clutches of the appellant, she did not do so and on the contrary lived with him practically as his wife. The statement made by her that the appellant committed rape on her against her wish is not probable and believable from her own conduct. Finally it was submitted that the appellant belongs to a community where second marriage is permissible and, therefore, lenient view is required to be taken by reducing the sentence awarded by the trial Court.

7.1. Mr. KC Shah, Ld. APP, while supporting the judgment and order of conviction and sentence of the trial Court, submitted that the appellant being married man and father of two children, does not deserve any leniency. He submitted that the appeal deserves to be rejected.

8. After considering the submissions advanced before us carefully, we find substance in the submissions made before us by the learned advocate Mr. Lakhani for the appellant. Considering the facts and circumstances of the case and more particularly the age of the victim being almost 16 years and having moved freely with the appellant for about 23 days at different places as his wife, would certainly go to suggest that she was in fact a willing partner to all the acts having been committed by the appellant. It is equally true that the appellant has committed the offence of taking a minor girl away from the lawful custody of her parents, but in view of the fact that the victim almost crossed the age of minority and has virtually become major, as can be seen from the medical evidence, namely that she was about 17 to 19 years of age and, therefore, physically also she was looking like an adult girl, the offence of kidnaping

as far as the present case is concerned, is nothing but a technical offence.

8.1. As far as the offence under section 376 of the IPC is concerned, it is not possible for us to accept the say of the victim that the appellant committed rape upon her on several occasions against her wish and desire. The conduct of the appellant and victim shows that they were in love with each other. The appellant being the unfortunate accused could have waited for sometime atleast till such time she becomes major. Apart from that, the parties being Muslim and second marriage is permissible in their community. Thus, taking into account the aforesaid facts and circumstances, we are clearly of the opinion that the sentence of life imprisonment awarded by the learned trial Judge as far as offence under section 376 is concerned, is too harsh and unwarranted. In any case, since it has been proved that the appellant has committed the offence of taking away a minor girl from the lawful custody of her parents while enticing her, the appellant is liable to be convicted and can be awarded suitable sentence. Had it been a case of teenage love affairs, we would have awarded even less sentence. However, considering the fact that the appellant being a married man and the father of two children, we may take a little serious view in the matter by awarding substantive sentence.

9. In the result, the appeal is partly allowed. The judgment and order of conviction and sentence for the offences punishable under sections 363 and 366 of the IPC passed by the trial Court are confirmed and maintained. The order of sentence of fine under sections 363 and 366 is also maintained. However, while confirming the conviction under section 376 of the IPC, we reduce the sentence from rigorous imprisonment for life to rigorous imprisonment for a term of five years and to pay a fine of Rs.5,000/=, in default to undergo further RI for three months. All the substantive sentences are directed to run concurrently. The appellant will be entitled to get set off of the sentence already undergone by him. Order accordingly.

Muddamal articles to be disposed of in terms of the direction given in the impugned judgment by the learned trial Judge.

In view of the above, no order is required to be passed in Criminal Misc. Application No. 7459 of 2004. Hence it is disposed of accordingly. Notice discharged.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.